

1 THE COURT: Right.

2 MR. LITTLE: And then after the Second Circuit
3 decided the case, it -- they made a motion for reconsideration.
4 The Second Circuit didn't simply deny it because they were too
5 busy to read it. They asked for our briefing and we briefed it
6 very thoroughly. It was submitted to the court. The court
7 obviously -- I think we have to assume the court read the
8 papers; it's the Second Circuit -- and they denied it, so it is
9 the law the case and it's foreclosed absolutely.

10 THE COURT: But how can they decide that issue as a
11 factual matter? It's not -- they have no record of it.

12 MR. LITTLE: Well, it's not for us to question them,
13 Your Honor. It's the law of the case. I mean --

14 THE COURT: Well, no, I mean --

15 MR. LITTLE: I mean, I can address the thing on the
16 issue. I mean, look it, Your Honor. For years Coudert charged
17 hundreds of thousands of dollars in an ongoing attorney/client
18 relationship with Statek which was run by Johnston Spillane.
19 Their virtual executive office was in Connecticut. And I think
20 the most remarkable thing is Ms. Frierman herself before the
21 court here actually said the following, and this is a
22 transcript of May 18th, 2009, over three years ago. "The
23 attorney/client relationship itself between Statek and Coudert
24 was really centered in Connecticut. Statek during the time it
25 was represented by Coudert maintained a place of business in

1 Connecticut. All communications were between Connecticut and
2 London. Bills were sent to Connecticut. As I said,
3 communications were made and paid from Connecticut and
4 communications were between England and Connecticut."

5 Coudert was representing Statek, its client, in
6 Connecticut. The discovery as I understand it -- and I think
7 this is -- I'm sure this is in the briefs as well -- Coudert
8 had other clients in Connecticut. It was an international law
9 firm. It had clients in Connecticut. It was doing business in
10 Connecticut.

11 THE COURT: But wouldn't the Second Circuit then be
12 acting as a trial court to be making those findings? I mean,
13 it seems to be that the reason they denied the motion is that
14 it wasn't germane to their ruling. I mean, it's not -- it
15 wasn't an issue on appeal.

16 MR. LITTLE: Well, that may well be, Your Honor, but
17 we have the mandate from the Second Circuit.

18 THE COURT: Well, I --

19 MR. LITTLE: It's not for us to overrule the Second
20 Circuit.

21 THE COURT: I understand that, but I don't -- I guess
22 what I'm saying is that it seems consistent to me with that
23 mandate to say that this issue is a separate factual issue.
24 They haven't decided -- I mean, I could -- certainly it's a
25 one-sentence denial of their motion. It doesn't explain the

1 reasons for it, so you have to I guess read between the lines,
2 but it seems to me it's as consistent if not more so with the
3 notion that this is an issue that needs to be developed below.

4 MR. LITTLE: There is a significant --

5 THE COURT: I'm sorry, just to interrupt you.

6 MR. LITTLE: Sorry.

7 THE COURT: Isn't -- I mean, applying Connecticut law
8 includes the issue of whether there's *in personam* jurisdiction.

9 MR. LITTLE: Not here, Your Honor, because they
10 didn't say apply Connecticut law; they said apply Connecticut
11 choice of law rules --

12 THE COURT: Well --

13 MS. LITTLE: -- in determining the statute of
14 limitations. That's the instruction from the court.

15 THE COURT: But if in fact, there is no *in personam*
16 jurisdiction, you wouldn't be -- you wouldn't get there in the
17 first place.

18 MR. LITTLE: That may well be, but that's been
19 decided, Your Honor, and we're bound by the law of the case.
20 It's absolutely clear.

21 THE COURT: Well --

22 MR. LITTLE: And in addition, if I may add, Your
23 Honor, because there is another argument, it was abandoned by
24 counsel. They -- when they made the original motion before
25 Judge Underhill in Connecticut it was both on lack of personal

1 jurisdiction and *forum non conveniens*. The court did not rule
2 on the lack of personal jurisdiction and the passing remarks
3 the court made were not determinative of that issue.

4 THE COURT: I understand that.

5 MR. LITTLE: It ruled on *forum non conveniens*.

6 THE COURT: Right.

7 MR. LITTLE: And then they, who could easily have
8 agreed to the conditions of the court and this case would have
9 been long ago decided in the U.K., decided no, they'd refuse
10 and therefore, the court withdrew its motion. At that point in
11 time, they could have pushed for a ruling on the motion to
12 dismiss for lack of personal jurisdiction. They never did.
13 There's no pending motion, by the way, to dismiss on the
14 grounds of lack of personal jurisdiction because an amended
15 complaint was filed with new, more detailed allegations, and I
16 recognize that there's been a stay in place but they've done
17 nothing about that.

18 So for years -- I mean, this has been going on for
19 years -- we're now at the point where we finally have a
20 decision on the statute of limitations, we have clear
21 instructions from the Second Circuit, and this is not the time
22 where they can back up and say, oh, wait a minute now. Despite
23 the fact we raised it not once but twice in the Court of
24 Appeals, we can still argue that there's a lack of personal
25 jurisdiction that prevents the court from ruling on the statute

1 of limitations issue. That's just not proper.

2 THE COURT: But where is the waiver?

3 MR. LITTLE: Their failure to pursue the argument.

4 THE COURT: But when?

5 MR. LITTLE: After they refused to comply with the
6 court's suggestion of dismissing on the grounds of *forum non*
7 *conveniens*.

8 THE COURT: But at that point, you had two things.
9 The stay was still in effect and -- well, three things. You
10 had the amended complaint and you had the motion to dismiss on
11 the -- simply on the basis of statute of limitations.

12 MR. LITTLE: No, Judge. Before you lifted the stay a
13 second time, the stay permitted them to proceed against the
14 complaint on personal jurisdiction *forum non conveniens*
15 grounds. When this -- the *forum non conveniens* thing got
16 locked up by their refusal to go along with the judge's
17 suggestion, they could have said, okay, Judge, your order still
18 would've permitted them to go back and say we need a ruling on
19 the dismiss for lack of personal jurisdiction. Instead of
20 letting that just percolate there and then go back and litigate
21 other issues and just leave it lying there, they had an
22 obligation to pursue that. Your order permitted them to pursue
23 it and they didn't do it. And frankly, I still think we win on
24 the merits here.

25 THE COURT: But is that -- is that a waiver, though?

1 MR. LITTLE: I believe it is. I believe it is.

2 The technical term is forfeiture not waiver, because
3 they did set forth in the answer the defense but it's not -- it
4 technically would be a waiver if they never raised it,
5 obviously, we know that. But it's a forfeiture because having
6 raised it, they didn't pursue it. And your partial relief from
7 the stay order permitted them to litigate that and they just
8 let it lie there and proceeded and it's too late now. I mean
9 there's too much water over the bridge now for them to raise
10 this again. And I think there's absolutely no room. And I say
11 this with all due respect, Your Honor, I mean you know what
12 you're doing, but in the Second Circuit they raised it, on
13 their main brief they raised it in a motion for
14 reconsideration. It was fully briefed. The court decided
15 against them. It's the law of the case.

16 THE COURT: Well, the cases and the commentators say
17 that denial of a rehearing is not law of the case.

18 MR. LITTLE: That's -- well, the -- well, maybe we
19 could go back to the Second Circuit about that. They -- do we
20 really believe that that panel, including Judge Newman, asked
21 for briefing on this and then just denied it because they were
22 too lazy, they were just wrong-headed about it.

23 THE COURT: No, I don't think it's because of
24 laziness; I just think it's not -- they didn't give a reason
25 but --

1 MR. LITTLE: Even if it's not law of the case are you
2 really saying, Your Honor, that this Court is free to ignore a
3 specific mandate from the Second Circuit, that on remand this
4 Court is to apply Connecticut choice of law? I don't think
5 that available, Your Honor. I respect the fact that you
6 disagree with the Second Circuit's opinion. I understand
7 completely what Your Honor is saying, but I don't believe that
8 there's --

9 THE COURT: I don't disagree with their underlying
10 opinion. I'm just trying to figure out how or what they mean
11 by saying simply apply Connecticut choice of law.

12 MR. LITTLE: They didn't say "apply Connecticut law";
13 they said choice of law.

14 THE COURT: I think that's what I said, Connecticut
15 choice of law.

16 MR. LITTLE: Exactly, Your Honor, and that's on the
17 whole statute of limitations issue. It's not choice of law,
18 okay, let's go back to personal jurisdiction. There's no
19 choice of law involved there. That's not a choice of law
20 issue.

21 THE COURT: Well, I understand. That's why I don't
22 think they needed to rule on it and they didn't.

23 MR. LITTLE: Well, they --

24 THE COURT: It's a separate issue that really wasn't
25 before them. I mean --

1 MR. LITTLE: It was before them, Your Honor. It was
2 raised in the main brief.

3 THE COURT: -- except the facts weren't before them.
4 There was no decision. There was no decision that -- I didn't
5 rule on it, Judge Hellerstein didn't rule on it, and Judge
6 Underhill didn't rule on it. No one ruled on that issue.

7 MR. LITTLE: They raised the issue on appeal not once
8 but twice, and it was not accepted by the court. The court has
9 given a clear instruction to the court. That's where we are.

10 THE COURT: Okay.

11 MR. LITTLE: Your Honor, if we apply then -- if we
12 apply then -- and look it, I just respectfully disagree, Your
13 Honor.

14 THE COURT: Okay.

15 MR. LITTLE: And if you want more briefing --

16 THE COURT: Well, do you have -- I mean, let me make
17 sure I understand your two arguments. The first argument is
18 that they forfeited this, right?

19 MR. LITTLE: Correct.

20 THE COURT: And in support of that, you assert that
21 rather than continue to litigate, after they didn't accept the
22 Connecticut court's condition for dismissal they instead made a
23 motion to dismiss here that didn't raise --

24 MR. LITTLE: Correct.

25 THE COURT: -- the personal jurisdiction point.

1 MR. LITTLE: Correct. Twice. In other words, they
2 still under your relief from the partial relief from stay
3 order, they could have gone back to Judge Underhill and said
4 okay, Judge, we don't accept this, but we need a ruling on
5 that, and that would've been the end of it, but they didn't do
6 that. And then when it came back here, motion to dismiss on
7 statute of limitations ground, not on personal jurisdiction
8 grounds, and then on appeal --

9 THE COURT: Well, are they --

10 MR. LITTLE: -- they -- I'm going to get to the
11 appeal in a second, but just on the forfeiture point is there
12 any case law that says that they have to make a choice on their
13 motion to dismiss and if they don't raise lack of *in personam*
14 jurisdiction they waived it or forfeited it?

15 MR. LITTLE: I can't quote any but there should be.
16 I mean the -- to let this case --

17 THE COURT: I didn't see that.

18 MR. LITTLE: To let his case languish for years with
19 them holding this in their back pocket, to litigate this all
20 the way up to the Second Circuit. They've been on this for
21 years and for them to --

22 THE COURT: Well, but I mean it's -- but when you
23 talk about it languishing, it -- the -- there was not a lengthy
24 delay between Judge Underhill's ruling and the motion to
25 dismiss, was there? And then the motion to dismiss was decided

1 and, you know, appeals take time but I --

2 MR. LITTLE: Well, they didn't need a whole lot of
3 time to say, Judge, we do not accept your conditions, we need a
4 ruling on the personal jurisdiction.

5 THE COURT: But remember, this is in a context where
6 Statek was not arguing that Connecticut law applied -- that
7 Connecticut choice of law applied. They weren't arguing that,
8 so it's like an unnecessary argument to make.

9 MR. LITTLE: It's not unnecessary if that kills the
10 case. I mean that's the whole point.

11 THE COURT: But it doesn't kill the case because they
12 filed a proof of claim here. There's jurisdiction now because
13 Statek filed a proof of claim in the Bankruptcy Court, so the
14 only reason to raise the argument was on a statute of
15 limitations argument where you're responding to an argument
16 that says that Connecticut choice of law principles applies
17 because the transferor court was Connecticut.

18 But the other issue, the *in personam* jurisdiction
19 issue for the merits, is mooted by the fact that they filed a
20 proof of claim so, you know, that invites jurisdiction here and
21 they have -- they submitted -- they did -- Coudert submitted to
22 the jurisdiction of this court by filing here so the proof of
23 claim covers it.

24 So to me, I would -- I understand your argument if
25 Statek had said we want Connecticut law to apply or it's one of

1 the -- either it or federal law or English law would apply, but
2 Statek didn't say that the law should apply.

3 MR. LITTLE: But I think --

4 THE COURT: And then you have the appeal I think,
5 which is part two.

6 MR. LITTLE: Right.

7 THE COURT: And I mean, obviously I thought about
8 that carefully because it was in fact remanded to apply
9 Connecticut choice of law principles and you can certainly read
10 into that in light of Coudert's having made the argument that
11 the transferor court didn't have jurisdiction, that they
12 considered that argument and rejected it, and that I should
13 assume that the Connecticut court did have *in personam*
14 jurisdiction. But it's -- to me that view I think requires
15 that they had decided on the merits that the Connecticut court
16 had *in personam* jurisdiction, and I don't seen how they could
17 have done that because there was no record of that, and it was
18 still in front of the Connecticut court.

19 MR. LITTLE: If it wasn't clear on the main briefs it
20 was certainly clear in the heavy briefing on the motion for
21 reconsideration, and I know Your Honor has copies of those
22 briefs. They've laid this whole thing out in the motion for
23 reconsideration. We laid out our response and the court
24 decided by rejecting that.

25 And so, again, what we have is a Second Circuit

1 decision, a mandate with clear instructions to apply
2 Connecticut choice of law. I don't know how they can go around
3 that and suggest this Court should say basically to the Second
4 Circuit, you know, you missed this point and so this Court is
5 not going to accept the instruction.

6 THE COURT: No, I'm not saying -- no, let me be
7 clear. I'm not saying that I think the Second Circuit made a
8 mistake. I'm saying that a more likely reading of their ruling
9 is that they denied the motion because it wasn't really an
10 issue before them. There's no -- there was no record of this
11 issue in the lower court. There is no record of the
12 jurisdictional issue before me or Judge -- I mean I certainly
13 didn't say anything about this issue. Judge Hellerstein didn't
14 say anything about it. How would they have decided this issue
15 which is based upon facts, you know, the contacts that Coudert
16 had in Connecticut? How could they have decided? There's no
17 factual record.

18 MR. LITTLE: If that were their thinking, Your Honor,
19 they would have remanded for a fuller record. They would have
20 accepted the argument but they didn't.

21 THE COURT: But did they wouldn't --

22 MR. LITTLE: They rejected it.

23 THE COURT: Do they need to? I mean I guess that's
24 my point. I don't think they need to say it because it's -- to
25 me it's obvious. If it isn't before them, there's not reason

1 to decide.

2 MR. LITTLE: But it affects their ruling. If their
3 reasoning is correct and the court's reasoning is correct on
4 this -- I'm not saying it's your reasoning, but if their
5 position is correct, then obviously the decision is erroneous.
6 How can you apply Connecticut choice of law if there is no
7 personal jurisdiction in Connecticut? And so basically, it's
8 saying to the -- it's saying that we're going to assume that
9 the court denied it for another reason and then stupidly went
10 ahead and said, we instruct the District Court to apply the
11 Connecticut choice of law rules. I mean that's the only
12 conclusion that can be made.

13 THE COURT: But --

14 MR. LITTLE: Otherwise, the Court of Appeals would
15 say, having reviewed the motion for reconsideration, we reverse
16 and remand to the Bankruptcy Court with instruction to: (a)
17 first determine whether or not there's jurisdiction to begin
18 with such that Statek had a right to sue in Connecticut and
19 invoke Connecticut law; and then (b) if that happens, yes,
20 apply Connecticut choice of law. But it didn't do that and so
21 we are stuck with, all of us, whether we like it or not, with a
22 clear instruction from the Court of Appeals to apply
23 Connecticut choice of law and there it is.

24 THE COURT: Well, let me ask you, what was the record
25 before then on the issue of personal jurisdiction?

1 MR. LITTLE: The very thorough briefing on the motion
2 for reconsideration reply.

3 THE COURT: But there are no -- that's just -- there
4 are no facts, right? Were there any facts then on the context?

5 MR. LITTLE: I believe there were. There was
6 discovery taken before Judge Underhill on the motion --

7 THE COURT: No, but is that -- was that before the
8 Second Circuit?

9 MR. LITTLE: I have to go back and look at the
10 briefs, but I do believe we cited the -- we cited to discovery
11 that was taken in Connecticut. I have to -- I don't want to
12 speak erroneously, Your Honor.

13 THE COURT: Okay. But, I mean, I --

14 MR. LITTLE: I'd have to go back and look at it.

15 THE COURT: Well, I guess, I mean if in fact they had
16 a factual record in front of them I would understand your
17 argument. I just --

18 MR. LITTLE: Judge, you know where I'm lost, really,
19 that we're arguing about whether or not Coudert was subject to
20 jurisdiction in Connecticut. Is that really a serious argument
21 in all fairness?

22 THE COURT: I don't know. I don't know.

23 MR. LITTLE: But it's uncontested, Judge. It's --

24 THE COURT: Well, let me ask --

25 MR. LITTLE: May I just make a point?

1 THE COURT: Right.

2 MR. LITTLE: Counsel, Ms. Frierman, in court -- it's
3 uncontested because this is what she said. The whole
4 relationship was based in Connecticut. They dealt with a major
5 client. They were charging hundreds of thousands of dollars
6 for legal service that was based in Connecticut. They have
7 other clients in Connecticut.

8 THE COURT: Well --

9 MR. LITTLE: How can the Connecticut long-arm statute
10 not apply? And again, I don't think it's for us to go back and
11 do this, but I think that even if the court looks at that, it's
12 obvious.

13 THE COURT: Well --

14 MR. LITTLE: And I believe the Second Circuit saw it
15 as being obvious. And if they mistakenly decided that well,
16 since this isn't totally right for a factual review, since
17 there wasn't a motion for summary judgment, it wasn't fully
18 decided, maybe we shouldn't go there. But to me, it's
19 painfully obvious --

20 THE COURT: Well, let me --

21 MR. LITTLE: -- that Coudert is subject to
22 jurisdiction in Connecticut.

23 THE COURT: I have tried to look at this practically
24 also. It seems to me that however I rule on this, there will
25 be an appeal. And since I am likely, unless the DSI folks can

1 persuade me otherwise, to say that I'm going to deny their
2 motion on the Connecticut grounds because there needs to be
3 discovery there, there's going to be delay anywhere, what -- it
4 seems to me it's more practical and will actually end up saving
5 time if people go to Judge Underhill and say, you know, is
6 there jurisdiction or not. It was fully briefed in front of
7 him. The record is there. That's present for him.

8 THE COURT: Well, I think Your Honor is looking at
9 this correctly. Because of the 12(b)(6) standard for review,
10 the motion has to be denied. I mean that's plain. And so the
11 question then becomes what's the most expeditious way after
12 seven years of litigation to finally get a resolution here one
13 way or the other, whether it's procedural or substantive. And
14 what I'd ask the Court for is a ruling that permits us to move
15 efficiently and quickly and not get bogged down on this thing.

16 The worst thing that would happen, I don't think the
17 Court is going to do this, is to say that the Court's not going
18 to follow this. It's going to decide that (a) it's original
19 order denying the motion for reconsideration was justified
20 because there were new grounds; and/or (b) I'm not going to
21 apply the Connecticut choice of law thing and then provoke an
22 appeal with these issues all confused.

23 I think the Court's right. The clean way and proper
24 way to do this is to deny this as a 12(b)(6) motion because
25 there's no factual record and on the -- the standard is, it has

1 to appear beyond doubt that there are no set of facts that
2 would support the allegations of the complaint and the
3 complaint plainly alleges sufficient facts for jurisdiction.
4 But what I would suggest is that this case be remanded to Judge
5 Underhill, the stay be lifted.

6 By the way, if I could raise one point, Your Honor,
7 there's actually -- I know it's been ages, but the original
8 motions for relief from the bankruptcy stay were made in 2007
9 and 2008. And when the court lifted them partially, it ruled
10 that it would go back to the motions to lift the stay in the
11 future, so those motions are still pending so I don't think
12 it's necessary to make new motions.

13 What I'd ask for is that the stay be lifted so we go
14 back before Judge Underhill to deal with these issues and
15 still, as I said, I don't concede that the Court should not
16 apply the standard Connecticut choice of law, but it's pretty
17 clear to me at this point that their motion has to be denied.

18 I can -- if the court would like, I would like to
19 address the other issues. I don't know if your suggestion
20 moots that or whether or not you'd like me to address them.

21 THE COURT: Well, remember, it's not denying -- the
22 first hurdle you have to get over is to win on reconsideration
23 and then we focus on denial of their motion.

24 MR. LITTLE: Right.

25 THE COURT: And they, of course, will say that your

1 assertion of tolling because of the continuing wrong doctrine
2 is not plausible, but it's hard for me to know that given the
3 facts, I think, as alleged in the complaint so --

4 MR. LITTLE: Right.

5 THE COURT: The only thing I'd qualify is that I
6 think at this point we're more at the -- you're ignoring
7 Twombly and Iqbal a little bit there.

8 MR. LITTLE: I'm sorry, Your Honor?

9 THE COURT: You're ignoring Twombly and Iqbal a
10 little bit but I'm still even applying Twombly and Iqbal to the
11 complaint on this issue, it would seem to me that it's -- the
12 facts would need to be developed in order to assert that the
13 statute was not tolled.

14 MR. LITTLE: Well, the -- I mean, I think it is clear
15 and I won't go into detail if Your Honor believes it is clear
16 that in Connecticut they still apply the law of the forum. I
17 think the cases are absolutely crystal clear on that.

18 THE COURT: Well, on statute of limitations, yes.

19 MR. LITTLE: Yes, yes, so --

20 THE COURT: I agree with that.

21 MR. LITTLE: Okay. Then I don't need to pursue that.
22 But under Connecticut law the course of conduct -- there are
23 two things under Connecticut law which extend the statute
24 beyond the rigid rule of three years. You don't count from
25 1996 when Coudert was asked for files. You count from when

1 because of the continuing course of conduct withholding the
2 files and because of the continuing relationship even if --
3 first of all, we believe there was an attorney/client
4 relationship, but even if there weren't, they were holding
5 files that belonged to Statek. They had an ethical duty to
6 produce those files and by withholding those, it was a
7 continuing wrong. They were continuing to hold property of
8 Coudert's --

9 THE COURT: I haven't --

10 MR. LITTLE: -- despite repeated requests.

11 THE COURT: In either -- I have not seen in either
12 side's briefing on this that that type of conduct, withholding
13 files as a former counsel would either give rise to a
14 malpractice claim or not give rise to it. I didn't see anyone
15 citing cases either way on that point.

16 MR. LITTLE: Well, first of all --

17 THE COURT: I understand the ethical argument.

18 MR. LITTLE: Right.

19 THE COURT: But ethics is not necessarily
20 malpractice.

21 MR. LITTLE: Well, first of all, we contest the fact
22 that the relationship ended.

23 THE COURT: Right, I understand that --

24 MR. LITTLE: I mean, that's not true.

25 THE COURT: -- you're saying that they were still

1 counsel and I think that's one of the facts --

2 MR. LITTLE: They were still counsel.

3 THE COURT: -- that would need to be developed.

4 MR. LITTLE: And the letter that was sent to them by
5 Skadden Arps did not say we represent Statek.

6 THE COURT: It didn't fire them.

7 MR. LITTLE: Right.

8 THE COURT: You could have more than one counsel.

9 MR. LITTLE: That's right, okay. I think that's very
10 clear.

11 THE COURT: And it came from Statek's parent which
12 then became Statek but --

13 MR. LITTLE: Right.

14 THE COURT: I just -- yes, I agree with you that on
15 the easiest point for Statek to win here on the tolling, the
16 facts are not sufficiently clear from the complaint to say that
17 Coudert was no longer counsel.

18 MR. LITTLE: Right.

19 THE COURT: Beyond that it appears to me that there's
20 an open issue as to whether a former counsel has an obligation
21 that rises to the level of a malpractice claim if it doesn't
22 return files.

23 MR. LITTLE: I mean, we'll --

24 THE COURT: Neither side has cited any case law on
25 that.

1 MR. LITTLE: We'll certainly do that. We'll
2 supplement the briefing if that's acceptable to the Court.

3 THE COURT: I'm not sure I need. I don't think I
4 need to get there because there's the first issue, which is
5 it's not clear when Coudert stopped being counsel so ...

6 MR. LITTLE: Well, it may become relevant anyway.

7 THE COURT: At some point, but I don't think it's
8 relevant as far as if I go to the merits on the motion to
9 dismiss.

10 MR. LITTLE: But I --

11 THE COURT: I think you win on the first point.

12 MR. LITTLE: I also think that even if they somehow
13 develop facts sufficient to indicate that there was no formal
14 attorney/client relationship, I think it's a real stretch to
15 say it's not legal malpractice for a law firm to fail to
16 produce to a client --

17 THE COURT: Well, I don't know. I mean that's an
18 issue for summary judgment or for some later date. I don't
19 think you need to brief it for this motion.

20 MR. LITTLE: Right, okay. So the -- what we'd ask
21 for, Your Honor, is some way where this litigation can proceed
22 without getting bogged down again. It's been seven years and
23 we've been up and down and around on all these issues. And it
24 seems every time that Statek's able to take a step forward,
25 there's another procedural objection raised.

1 THE COURT: Well, you know, statute of limitations,
2 but I can't really fault DSI for raising the statute of
3 limitations.

4 MR. LITTLE: I think that this whole case would have
5 been resolved a lot sooner if their motion to dismiss for lack
6 of personal jurisdiction was dealt with way back when before
7 Judge Underhill on the factual record that --

8 THE COURT: No, but it wouldn't. It wouldn't because
9 you could still file your proof of claim. It wouldn't have
10 mattered.

11 MR. LITTLE: It'd matter on the statute of
12 limitations, Your Honor. And now we've spent all this time
13 arguing about the statute of limitations, and now they say, but
14 wait, actually, it doesn't really apply because there was never
15 jurisdiction in Connecticut to begin with and seven years have
16 gone by; and now we're going to revisit that? Number one, I
17 don't think we can revisit it for the obvious reasons.

18 THE COURT: When did Statek first raise this issue?
19 It raised it in its motion for reconsideration which was from
20 July 31, 2009; so, yes, there have been three years since then
21 when its been on appeal. But the issue of Connecticut law
22 applying was first raised July 31, 2009 by Statek after it
23 didn't raise the issue in its defense in the motion to dismiss.

24 MR. LITTLE: But they raised it in their answer and
25 they raised it in a motion before Judge Underhill.

1 THE COURT: But it -- I can only say this one more
2 time and I'll only say it one more time. There was an
3 important intervening event which is the bankruptcy case,
4 right? I mean they have personal jurisdiction in the
5 bankruptcy case.

6 MR. LITTLE: That's right but they're concerned about
7 the application of Connecticut law. They knew that issue was
8 out there, and they knew they were moving --

9 THE COURT: They didn't because your guys didn't
10 raise it. I certainly didn't know it was out there. I didn't
11 research Van Dusen because no one raised it. I mean it's --
12 the reply is pretty funny. It said more likely Coudert did not
13 appreciate the fine nuance. None of the parties in Global
14 Industrial Technologies or Jafare [Ph.] cited in Coudert's
15 brief on page 7 appears to identify the nuance either. And
16 certainly neither court discussed it or decided the issue. The
17 issue was not even implicated in Gaston and Stone. I mean --

18 MR. LITTLE: Well --

19 THE COURT: They're very pleased to have thought
20 about it after it was raised. I mean, after it was -- the
21 motion was litigated without it being considered.

22 MR. LITTLE: What we'd ask for, Judge, because
23 there -- even though it's from 2008, there is a pending motion
24 for relief from the stay, we think that their motion -- the
25 bottom line is their motion has to be denied for whatever

1 reason and the case referred back to Judge Underhill. And we
2 should proceed on all of this before Judge Underhill and not be
3 limited to this piece-meal kind of litigation. Because if the
4 only relief from the stay is going to be let's develop the
5 facts on personal jurisdiction and then come up all the way
6 back again --

7 THE COURT: Aren't they developed? I mean I thought
8 it was all briefed and ready for him to decide and he limited
9 the decision to the *forum non conveniens*?

10 MR. LITTLE: I'd have to go back and look at the
11 record, Your Honor. I wasn't counsel of record at that point.

12 THE COURT: I mean, the reason I would lift the stay
13 is because he'd already dealt with it. I wouldn't lift the
14 whole thing. I mean, I spend a lot more time with the other
15 stuff than he has.

16 MR. LITTLE: And also, Your Honor, there's no pending
17 motion to dismiss for lack of a personal jurisdiction. There's
18 an amended complaint. And I know they didn't have to answer,
19 but amended complaint has to be filed. This whole thing has to
20 be redone. They can't --

21 THE COURT: Well, you have --

22 MR. LITTLE: They can't --

23 THE COURT: You have an amended complaint.

24 MR. LITTLE: But there's no answer. Their answer in
25 their motion is not valid against the subsequent complaint.

1 They're going to have to answer it and make a new motion and
2 that should be done in Connecticut before Judge Underhill. We
3 should go back to Connecticut and litigate that as appropriate,
4 but I still don't think that this Court or the Connecticut
5 court would be free to ignore the mandate of the Second
6 Circuit. I think it's going to be moot because I can't
7 conceive frankly -- and again, I find it very frustrating after
8 seven years, and obviously, I don't blame the court -- but very
9 frustrating after seven years where a law firm is actually with
10 a straight face making the argument there was no jurisdiction
11 over in Connecticut when it dealt for years and charged
12 hundreds of thousands of dollars representing a client in
13 Connecticut and they have other clients in Connecticut. I
14 don't get it. The Connecticut long-arm statute clearly
15 applies. And I know technically there hasn't been a ruling on
16 it yet and technically we've had motions to dismiss, but this
17 is -- this has turned into, frankly, a procedural farce.

18 THE COURT: Okay.

19 MR. LITTLE: Thank you, Your Honor.

20 THE COURT: Okay.

21 MS. FRIERMAN: Good morning, Your Honor, Karen
22 Frierman from Stern, Tannenbaum & Bell, and I have my partner,
23 David Tannenbaum with me today.

24 MR. TANNENBAUM: Good morning, Your Honor.

25 MS. FRIERMAN: We also are pleased and ready in

1 whatever expedited briefing schedule Your Honor wants to set to
2 address the issue you've raised about reconsideration under
3 Rule 59 and we think that you're exactly right, that that needs
4 to be resolved before any of these other issues can be
5 resolved. And I think that it's very significant that the
6 Second Circuit, not only as Your Honor said, didn't just
7 reverse the case but remanded it for further proceedings here
8 for Your Honor to decide the motion for reconsideration, but in
9 fact expressly pointed out that the appeal from the main
10 decision was untimely. And I think that's an important
11 distinction that they made, that that -- they were not
12 addressing that but only the reconsideration motion.

13 I want to address briefly, and I apologize I'm going
14 to jump around a little bit because I want to address some of
15 the points that came up in your discussion with Mr. Little, but
16 I want to talk for a moment, if I could, about this idea that
17 there was some kind of waiver or forfeiture by Coudert of the
18 personal jurisdiction defense in Connecticut. And I think it's
19 helpful to put some actual dates on the actual events up there
20 to see how, in our view, ridiculous the idea that there was any
21 waiver or forfeiture was.

22 On February 3, 190 -- 2006, excuse me, February 3,
23 2006, Coudert made a timely motion in the Connecticut District
24 Court to dismiss the complaint there for lack of personal
25 jurisdiction and on *forum non conveniens* grounds. In March 23,

1 2007, the -- which was then a Connecticut state court case was
2 remanded to the District Court following Statek's bankruptcy
3 filing. In September --

4 THE COURT: You mean, Coudert's bankruptcy filing?

5 MS. FRIERMAN: Coudert's bankruptcy filing, I'm
6 sorry.

7 THE COURT: And what was the petition date for
8 Coudert?

9 MS. FRIERMAN: Do you know the petition date?

10 MR. TANNENBAUM: September 2006.

11 MS. FRIERMAN: September 2006.

12 THE COURT: So -- and when was the state court action
13 brought?

14 MS. FRIERMAN: The state court action was commenced
15 in November of 2006.

16 MR. TANNENBAUM: 5.

17 MS. FRIERMAN: 5. Excuse me, November of 2005.

18 THE COURT: 2005. 2005.

19 MS. FRIERMAN: And there was an express allegation in
20 the complaint at that time that Coudert was in dissolution
21 already at that point. So the case gets removed to the
22 Connecticut District Court following Coudert's bankruptcy
23 March 23, 2007.

24 On March 5, 2007, Your Honor so ordered the parties
25 stipulation allow -- granting relief from the automatic stay so

1 that the Connecticut court could oversee discovery on and
2 decide the pending motion on jurisdiction and *forum non*
3 *conveniens*. And in the course of that, the parties before
4 Judge Underhill both said that all discovery on that issue had
5 been complete by the time Judge Underhill read his decision.

6 Judge Underhill rendered his decision on February 21,
7 2008, which as Your Honor knows, originally dismissed the case
8 on *forum non conveniens* grounds. He then withdrew that opinion
9 and put some conditions on the withdrawal, which were designed
10 to protect any statute of limitations from tolling during that
11 period between his decision and refiling only.

12 So that was May 8, 2008, the Connecticut District
13 Court was reinstated. The Connecticut District Court
14 reinstated the action there May 8, 2008. Less than a month
15 later on June 2, 2008, Statek moved for relief from the stay,
16 again to file an amended complaint so it could assert what it
17 described as English law claims.

18 On August 21, 2008, Your Honor so ordered the
19 stipulation that lifted the automatic stay solely for the
20 purpose of allowing Statek to file that amended complaint,
21 specifically provided that no answer was required by Coudert,
22 and directed the parties to mediate their dispute under the
23 auspices of the Connecticut -- of the New York Bankruptcy
24 Court.

25 So at that point, the case was back in the hands of

1 the Bankruptcy Court. Coudert had to deal, as Your Honor said,
2 with the claim in any event. It made no sense and there was no
3 reason for it to go back to Connecticut at that point and there
4 certainly was no knowing or deliberate waiver that you would
5 necessary to find a waiver of that claim.

6 THE COURT: Well, let me ask you procedurally. It's
7 clear that the parties acknowledged connection with the first
8 complaint and answer that discovery was finished, it was
9 complete on the issue of *forum non conveniens* and personal
10 jurisdiction.

11 MS. FRIERMAN: Yes.

12 THE COURT: But there has been an amended answer --
13 excuse me, an amended complaint filed since then.

14 MS. FRIERMAN: Yes.

15 THE COURT: So if one were to litigate the issue of
16 *in personam* jurisdiction at this point, what would be the
17 procedural basis for it?

18 MS. FRIERMAN: Well, we could certainly -- if Your
19 Honor, wants the case to go back to Judge Underhill for
20 decision on that motion, then I would suggest that the stay be
21 lifted and the earlier stay saying that Coudert does not have
22 to respond to the complaint be taken out of any further order
23 and we can either file an answer or we can make a pre-motion
24 ans -- we can make a pre-answer motion. Then it will be teed
25 up again before Judge Underhill.

1 THE COURT: Would there be any additional discovery
2 or do you just go on the old record?

3 MS. FRIERMAN: I do not at this moment think there
4 would be any need for additional discovery. In fact, the
5 amended --

6 THE COURT: I mean, the amended complaint narrowed --

7 MS. FRIERMAN: Exactly.

8 THE COURT: -- the issues.

9 MS. FRIERMAN: In fact, the amended complaint
10 narrowed the issues and from our perspective, and I don't want
11 to argue the motion before Your Honor, but I think that it
12 narrowed the issues to such an extent that it's going to be --
13 you know, Judge Underhill already thought that there was no
14 basis for *in personam* --

15 THE COURT: Well, I don't know what he thought. I
16 mean I think the parties have quoted things from what he said
17 that stand for themselves, but they have to be looked at in the
18 context of how he ruled so -- let me ask you a different
19 question.

20 There was a gap of nine or ten months between the
21 filing of the complaint in Connecticut state court and the
22 Chapter 11 filing, November 5, 2005; the Chapter 11 filing was
23 September of 2006. That filing would have tolled the statute
24 of limitations.

25 MS. FRIERMAN: I'm sorry, Your Honor, which filing?

1 THE COURT: The Chapter 11 filing would have tolled
2 the statute of limitations because at that point it's tolled.
3 So I guess conceivably if you had prevailed on the lack of
4 personal jurisdiction, then the statute conceivably could have
5 run between November 5, 2005 and September 2006, so maybe I
6 spoke too soon when I said that the lack of personal
7 jurisdiction was only an issue in connection with the statute
8 of limitations argument as opposed to the underlying merits.
9 Are you following me on this?

10 MS. FRIERMAN: I think that what Your Honor said
11 earlier, if I understood it and which I think was correct, is
12 that the only reason because Coudert had to deal with the proof
13 of claim that was filed in this action --

14 THE COURT: Right.

15 MS. FRIERMAN: -- regardless of anything that
16 happened in Connecticut, didn't happen in Connecticut, happened
17 anywhere else in the world. But the only time that it became
18 relevant for Coudert to come to grips, so-to-speak, to raise
19 again the issue of the lack of personal jurisdiction was when
20 Statek for the first time raised the Van Dusen Ferrens transfer
21 issue.

22 THE COURT: Right, I did say that. Now I'm wondering
23 whether I was wrong in that there's like nine months in there
24 where the statute could have run if you got the -- if I found
25 or that Connecticut had found -- Connecticut court found that

1 the original complaint couldn't stand because there was no
2 *personam* -- no *in personam* jurisdiction.

3 MS. FRIERMAN: I'm sorry, Your Honor. I'm not sure
4 I'm 100 percent following you. Which nine months are we
5 focusing on?

6 THE COURT: Between November 5, 2005 and the petition
7 date, the Chapter 11 petition date. I'm not sure that that
8 period is really a issue anyway, though.

9 MS. FRIERMAN: Well, I think it's our position that
10 by November 2005 the statute had already run.

11 THE COURT: Right.

12 MS. FRIERMAN: I mean, I don't know if that answers
13 your question. I'm not sure I'm completely understanding where
14 you're going, but Statek -- but Coudert did timely respond to
15 the November complaint --

16 THE COURT: Right.

17 MS. FRIERMAN: -- by asserting the defense.

18 THE COURT: Right.

19 MS. FRIERMAN: So I don't see where --

20 THE COURT: Well, their argument is that you should
21 have kept pressing it all the way through and you're saying you
22 didn't have to keep pressing it and we didn't waive it by not
23 pressing it because in fact we didn't have to keep pressing it,
24 we had these other arguments that were much more relevant.

25 MS. FRIERMAN: Right, and because the case was really

1 at that point centered here.

2 THE COURT: On the issue of whether federal choice of
3 law principles applied or New York or English apply.

4 MS. FRIERMAN: As it developed, yes.

5 THE COURT: Right. Okay.

6 MS. FRIERMAN: You know, I also want to say that as
7 Your Honor pointed out, you know, we cite the cases in our
8 brief that there's really no precedential value to the Second
9 Circuit's denial of the motion for rehearing. And I think
10 that, you know, some -- the discussions that are going on here
11 prove why that's the case.

12 THE COURT: Well, I agree with that. I mean they did
13 say, though, remanded to apply Connecticut choice of law
14 principles they could have said remanded to consider the issue
15 in light of, among other things, the applicability of choice of
16 law principles.

17 MS. FRIERMAN: Right, but I think that the reason
18 that the denial of the rehearing is not of any precedential
19 value or one of the reasons for that is that it's just reading
20 tea leaves.

21 THE COURT: No, I understand that point.

22 MS. FRIERMAN: Right.

23 THE COURT: And the law is on your side on that
24 point. I'm focusing not on the denial of the rehearing, but on
25 the actual remand which said apply Connecticut choice of law

1 principles. Statek says with, you know, with some force that
2 they didn't say apply Connecticut choice of law principles
3 after you decide that you should (a) reconsider under Rule 59
4 and (b) determine that there's -- there was *personam*
5 jurisdiction in the transferor court. They didn't say either
6 of those things. They just said -- they just jumped to the
7 third step. They say it's a third step and a final step. It's
8 in essence as if the order said get to the merits of the motion
9 to dismiss.

10 MS. FRIERMAN: But I think that as, again, Your Honor
11 said earlier, the Second Circuit didn't say -- didn't treat the
12 issue at all in their decision and that may very well have been
13 because the issue was not teed up before them. They had no
14 basis on which to determine whether there was one and --

15 THE COURT: Well, is there a factual record? I mean
16 did they have access to Judge Underhill's factual record?

17 MS. FRIERMAN: I do -- I am 95 percent certain that
18 the papers in support of the motion to dismiss before Judge
19 Underhill were not in the record on appeal.

20 THE COURT: And in any event --

21 MS. FRIERMAN: I think that all they would have
22 had -- I think that the only thing that might have been in the
23 record on appeal is Judge Underhill's decision itself but not
24 the underlying --

25 THE COURT: Which didn't cover the issue of *in*

1 *personam* jurisdiction.

2 MS. FRIERMAN: Only in his comments --

3 THE COURT: Right.

4 MS. FRIERMAN: -- on his views as to that.

5 THE COURT: Okay.

6 MS. FRIERMAN: And in fact, just to go back for a
7 moment to a point that we've been discussing before Your Honor
8 about when Statek for the first time even raised the specter of
9 Connecticut law applying, their original complaint itself was
10 reported to be asserted claims based on New York law, so even
11 then there was no basis. But you know, we -- I'm happy to
12 discuss all -- you know, any and all of the issues that have
13 been raised, but we do think that the Rule 59 motion should be
14 resolved first.

15 THE COURT: Okay. Well, I mean, let's assume that I
16 got to the merits of the motion to dismiss.

17 MS. FRIERMAN: Okay.

18 THE COURT: It did seem to me that first Baxter and
19 most of the subsequent case law from Connecticut treats a
20 statute of limitations as not being governed by choice of law
21 Connecticut principles that would go to the interest analysis,
22 but they stick with it as when you're focusing just on statute
23 of limitations, as a Lex 4 analysis that again looks at --
24 unless it's a statute that's part of the underlying statutory
25 cause of action, as a procedural statute and therefore

1 Connecticut law would apply.

2 I mean, I know you cite two or three cases that go to
3 the contrary arguably, although arguably they're dicta, but
4 they don't seem to really get into this with the level of
5 overruling Baxter.

6 MS. FRIERMAN: Well, I mean I --

7 THE COURT: Or could because they're either lower
8 court cases or a District Court case.

9 MS. FRIERMAN: No, they certainly could not overrule
10 Baxter, but I think that they certainly indicate a feeling by
11 the lower courts in Connecticut and in Connecticut District
12 Court that the issue is not in fact settled and that
13 particularly after the other cases, Jagway [Ph.] and O'Connor
14 on the substantive law, that it's not clear that Baxter would
15 in fact be -- still be upheld by the Connecticut Supreme Court.

16 And, in fact, I have found what Judge Underhill says
17 on the subject and this is in a case called Dennany v. Knights
18 of Columbus, 2011 WestLaw 3490039, and that's on August 10th in
19 2011. And in this case, Judge Underhill said that at page 3
20 that:

21 "Statute of limitations are deemed procedural under
22 Connecticut law and therefore, Connecticut courts traditionally
23 apply Connecticut's statute of limitations when the plaintiff
24 is pursuing a common law cause of action. Nevertheless, there
25 has been several recent District Court decisions rejecting the

1 traditional approach and instead applying the statute of
2 limitations of the state with the most significant relationship
3 to the suit consistent with the restatement second conflict of
4 laws."

5 So I think that certainly Judge --

6 THE COURT: What did he do in that?

7 MS. FRIERMAN: Well, in that case, he didn't decide
8 because the law would be the same under either of the potential
9 jurisdictions, but --

10 THE COURT: So maybe you want him to decide
11 everything too?

12 MS. FRIERMAN: I'm sorry?

13 THE COURT: Maybe you want him to decide everything
14 too.

15 MS. FRIERMAN: Well, we're happy to have the matter
16 before Your Honor. But I think it's indicative that it's not
17 quite so crystal clear that Baxter which pre-dates the cases
18 that I cited in my brief that Your Honor alluded to and Justice
19 Underhill's decision in the Dennany case that Connecticut is
20 still so wedded to what even Statek referred to in earlier
21 papers as a legal anachronism an outdated approach to the
22 choice of laws. And I would think that the better approach
23 would be, in fact, to look and see which date has the more
24 significant relationship.

25 And it's particularly powerful here because of the

1 issues about personal jurisdiction over Coudert in Connecticut
2 because Statek itself is asserting that it's asserting claims
3 under English law and because, in fact, when the complaint was
4 amended, the old complaint had lots of terrible allegations of
5 horrible things that Coudert allegedly did while it was, I'll
6 say representing Johnston and Spillane, and I put it that way
7 only because I don't want to get in right now to a question of
8 whether or not and when it was terminated by Statek. But in
9 the pre-1996 era of Statek, the first complaint is full of
10 horrific allegations of things that Coudert did. When they
11 amended the complaint, it's down to a single allegation
12 relating to this alleged failure to turn over all of the files.
13 That occurred in 1996, by which point Statek has said over and
14 over again that it had no presence in Connecticut at all. It
15 was a California corporation with no presence in Connecticut
16 during the times relevant to the amended complaint.

17 So really, would Connecticut be so high bound that
18 it's going to insist on applying Connecticut statute of
19 limitations to a case involving a plaintiff that had no place
20 of business in Connecticut during the relevant period of time,
21 alleged wrongdoing by a law firm in Great Britain which they
22 allege was in violation of English law, that had a bankruptcy
23 in New York. I just don't think that it's so quick to conclude
24 that Connecticut would do so and, in fact, I submit that it
25 would not.

1 And I just want to point on quickly that -- and I can
2 talk about the English borrowing statute and what the impact of
3 that would be. I think I go through it pretty well in my
4 brief, but I just want to point out that for the first time in
5 their reply papers on this subject, Statek tries to rely on a
6 different provision of the English Limitations Act, Section 32,
7 which is entitled "Fraud Concealment and Mistake," and I did
8 spend some time doing some research on what that statute
9 covers.

10 Now there's no allegation in this case and there's
11 never been any allegation in this case that the statute of
12 limitations should be tolled by virtue of any fraud or
13 concealment. So Statek says in their reply papers that there
14 was a -- like Section 32 of the English Limitation Act tolls
15 the statute because of mistake. It doesn't really identify
16 what the mistake is, whose mistake it is, but if you look at
17 the cases under Section 32, it's clear that it relates to the
18 kind of unilateral mistake that would in the United States, in
19 New York be the basis for a reformation claim of a contract,
20 not because you thought you had a cause of action and you
21 didn't.

22 There's a case called Thompson v. Arnold, which is
23 reported at -- I'm sorry, Your Honor. There's a case called
24 Kearns v. McCann Fitzgerald, which actually is a very good
25 case -- clear case relating to the same statute under Irish

1 law, which is 2008 WestLaw 2872605. And then there's a case of
2 Philips Higgins v. Harper, which is at 1954 WestLaw 15596. And
3 there an attorney went to work for --

4 THE COURT: Can I interrupt. Why should I even -- I
5 don't understand why I should even be considering this. I mean
6 again, this is like --

7 MS. FRIERMAN: Too late.

8 THE COURT: -- too late.

9 MS. FRIERMAN: Yeah, I agree. I agree.

10 THE COURT: And it's -- foreign law is a mixed
11 question of law and fact, so I mean they didn't present the
12 facts to me of this issue in --

13 MS. FRIERMAN: I agree.

14 THE COURT: -- in connection with the opposition of
15 the motion to dismiss, so this seems to me --

16 MS. FRIERMAN: I agree. It was in there. I just
17 wanted to raise the point that we don't think it's applicable
18 and that the case Sheldon is also easily distinguishable.

19 THE COURT: Okay.

20 MS. FRIERMAN: So this brings us all I guess to the
21 last issue, if Your Honor would like to hear us, and that's as
22 to whether or not in our view the claim would be timely under
23 the application of Connecticut statute of limitations.

24 THE COURT: All right.

25 MS. FRIERMAN: As we all know, it's a three-year

1 statute of limitations and it's really important to remember
2 and well settled in Connecticut law that the statute begins to
3 run with the date of the act and omission and not the date when
4 the alleged wrong was discovered.

5 Statek relies on the continuing course of conduct
6 tolling doctrine as Your Honor has recognized, and we think
7 it's significant at all that they don't rely on the continuing
8 representation document. We think that's an acknowledgment
9 that there really was no continuing representation in the --
10 that period. But it's clear in Connecticut that this exception
11 to the statute of limitations is narrowly and sparingly applied
12 because it contravenes the strong policy of the State of
13 Connecticut in favor of repose, and it's also in the
14 International Strategies case clear that it's a proper subject
15 on a motion to dismiss.

16 We -- in order to establish the continuing course of
17 conduct, Statek would be required to show later wrongful
18 conduct or a special relationship giving rise to a continuing
19 duty. What's the continuing wrongful conduct? Under their
20 theory -- and they've changed a little bit -- first, they said
21 that when the -- when more documents were produced to the
22 Trustee in 2004 that that was additional wrongful conduct
23 because in their view at that point not everything was
24 produced. So the first theory was doing the right thing is
25 additional wrongful conduct. But now they've changed that and

1 they say that the later production was only evidence that
2 Coudert previously failed to disclose all the information it
3 had, so if it's only evidence that they failed to produce
4 everything that they had originally, then I don't see where
5 there's wrongful conduct.

6 THE COURT: Because you're saying that's really
7 discovery as opposed to --

8 MS. FRIERMAN: Right, correct.

9 THE COURT: As opposed to continuing conduct. But I
10 think they're relying on the second prong of the rule, which is
11 an ongoing duty --

12 MS. FRIERMAN: Right, well --

13 THE COURT: -- through a special relationship.

14 MS. FRIERMAN: Right, exactly. And I think that
15 that's key.

16 THE COURT: And you know, the issue is, does either
17 the fact that they continued as counsel or were prior counsel
18 rise to the level of a special relationship?

19 MS. FRIERMAN: Well, you know, the whole problem that
20 I think that we have with their argument is that it makes the
21 statute of limitations endless.

22 THE COURT: Well, only for defendants who have a
23 special relationship.

24 MS. FRIERMAN: But even so, then it makes it endless.
25 The only time the statute of limitations would ever end under

1 their theory, as I understand it, is when the defendant 100
2 percent satisfies their duty, so it's sort of --

3 THE COURT: No, I mean if you establish, for example,
4 that Coudert was terminated in -- pick a date -- 2002, anytime
5 before November 5, 2005, then -- you know, then the
6 relationship ends unless there's the failure of a former
7 counsel to provide files is enough to create malpractice.

8 MS. FRIERMAN: Right. Well, but what they say is
9 that -- you know, they try to rely on the Connecticut Rules of
10 Professional Conduct to create this duty in a former, even in a
11 former attorney.

12 THE COURT: Well, that one, you know, I think they
13 have the burden as far as the tolling is concerned, so the fact
14 that neither side submitted case law on this is probably to
15 their detriment and not yours, but on the first point, don't I
16 need to decide when Coudert was terminated and no longer was
17 counsel? I mean it would seem to me that if they're counsel,
18 they have a special relationship and therefore, their ongoing
19 failure to provide files is -- fits within the Rule I think or
20 the exception to the Rule.

21 MS. FRIERMAN: Well, I think that, Your Honor, I
22 disagree to this extent, I think that there's case law that we
23 cite in our brief that really indicates that what's happening
24 here was not a continuing failure but really a failure once in
25 1996 to turn over the documents, and that's why we think even

1 Sanborn, which Statek had relied on previously, as well as the
2 Bellemare [Ph.] case --

3 THE COURT: I understand that. I think they lose on
4 the first prong of the test because that they're really turning
5 it into a discovery rule which Connecticut doesn't have, but
6 there's a second prong which is that a duty that remains in
7 existence.

8 MS. FRIERMAN: But until when?

9 THE COURT: Until they stop being counsel.

10 MS. FRIERMAN: But I think that their position is
11 that the duty continues even after they stop being counsel so
12 it's like endless.

13 THE COURT: Well, I understand that, but as long as
14 the first issue is a live issue, I don't see how I can rule in
15 a motion to dismiss that the statute has been tolled because
16 it's still a live issue. I'd have to take -- you know, you'd
17 have to develop it with sufficient facts, either have a motion
18 for summary judgment or if you can go to trial on it.

19 MS. FRIERMAN: Let me focus then specifically on that
20 narrow issue for a moment. When Coudert stopped being counsel
21 for Statek and, you know, I think that we should take Statek at
22 its own word. And in its complaint it says at least two times,
23 maybe more, but two times that I saw this morning when I was
24 flipping through it, that Coudert represented Statek from 1990
25 to 1996, period. That's their -- that's their allegation in

1 their complaint. Two times they say it, if not more.

2 They also make the same claim in -- they made the
3 same claim in their opposition to our motion to disallow the
4 claim at pages 2 and 6, and they make it in their -- they even
5 made it in the Second Circuit Appeal Brief at page 7. I think
6 that this idea that they spend from, I think it was, you know,
7 the early 90s, if not the late 80s, chasing after Johnston and
8 Spillane, multiple lawsuits in Delaware, finding out all these
9 horrific things that Johnston and Spillane supposedly did to
10 Statek, finding out in the course of those things that there
11 were questions raised about the behavior of some of Statek's
12 attorneys, questions raised about the propriety of some of
13 Coudert's bills that have said in the -- that the Delaware
14 Court mentioned in that decision, and they find all of these
15 things out, they have to fight tooth and nail to get control of
16 the company back, and bring a lawsuit to do that.

17 Finally, Mr. Vendel, through his nominee or himself,
18 is vindicated that he is the sole shareholder of Statek and he
19 kicks Johnston and Spillane finally to the curb. Coudert is
20 still representing him. Skadden Arps writes them a letter,
21 Mr. Vendel is now in control where he belongs. Don't do
22 anything with the money you're holding in your trust account.
23 Is it really plausible? Does that pass a straight-face test
24 that Statek is relying on the legal representation of Coudert
25 Brothers after that, really? And then even when they come and

1 they ask for -- so several months later they come and they say,
2 give us your files, Ms. Waring from Statek goes in, and this is
3 in the pleadings, this is not extra pleading, it's in the
4 pleadings that they go and they say we'd like your files and
5 they get some information, and they write another letter to
6 Coudert and they say that's not what I asked you for; I asked
7 you for X-Y-and-Z. And Coudert sends another letter and says
8 oh is this what you asked for? And in their complaint, they
9 demonstrate that they were dissatisfied with the responses that
10 they were getting in 1990 from Coudert to their requests.
11 We're supposed to believe that they thought that Coudert was
12 still their lawyers, really?

13 Johnston and Spillane lived like potentates, I think
14 that the Delaware said. Drug consiglieres, money here, money
15 there, money everywhere, stealing every penny blind while
16 Coudert was representing them. Of course, if I was Statek, I'd
17 continue to use Coudert. Who wouldn't? It makes sense to me.
18 Really, that's plausible? That entitles them. They talk about
19 their delay. That entitles them to keep Coudert on the hook in
20 this case when they waited all of those years. They had bigger
21 fish to fry. There's no question about it. In the 90s they
22 had bigger fish to fry. They had to find Johnston. They had
23 to find Spillane. They had to find this David Alfred
24 character. They had to start this bankruptcy in England. They
25 were plenty busy. They were plenty busy trying to collect the

1 money that Johnston and Spillane had stolen from them.

2 When they finally come around to it and they have
3 enough time and they have breathing room, then they decide to
4 go after Coudert, and the basis for their case now for being
5 able to do that after all those years is because Coudert was
6 still my lawyer. Coudert was still your lawyer? Really?
7 That's plausible under Iqbal? I think that there's enough
8 information before Your Honor of the record in their pleadings,
9 in the decisions of the Delaware Court that we have cited in
10 our brief for you to conclude that they were not the lawyer
11 after 1996. They say they were not the lawyer after 1996.
12 They say it twice at least in their complaint.

13 THE COURT: Well, they actually don't say that. They
14 say they represented them from 1996 to 1999.

15 MS. FRIERMAN: From 1990 to 1996.

16 THE COURT: Right.

17 MS. FRIERMAN: That's correct. That's correct.
18 That's what they say twice and they've said it in their papers
19 also. And in the absence of that relationship there's no duty
20 that tolls the statute of limitations. It turns it into a
21 discovery statute which Connecticut has said time and time,
22 again, the statute is not. And which Connecticut has time and
23 time again recognized that sometimes has harsh results.
24 Sometimes your cause of action -- you lose your cause of action
25 before you know about it. That's the way it goes. It's a

1 doctrine of repose and Coudert is entitled to repose even under
2 the Connecticut statute.

3 THE COURT: Okay.

4 MS. FRIERMAN: And the only other thing I would just
5 say is that for the same reason, you know, we don't think that
6 the policy behind the doctrine of continuing the course of
7 conduct applies because really what it's aimed at is trying to
8 preserve a relationship between entities to see if the problem,
9 whatever it is, can be worked out or will work itself out.
10 And, you know, as I said, we don't think that there was any
11 relationship that could be salvaged at that time.

12 And finally, unless there's anything else Your Honor
13 wants to ask me that we might have -- I might have passed over
14 is that -- no, I think that that's -- you know, I think that
15 that's it other than the arguments that we make in our brief
16 unless there's anything else Your Honor wants to ask us.

17 THE COURT: Okay.

18 MR. LITTLE: Your Honor, may I have just a few
19 minutes?

20 THE COURT: Sure.

21 MR. LITTLE: Not to re-do any argument.

22 THE COURT: No, that's fine.

23 MR. LITTLE: I'm really surprised at that dramatic
24 rendition of all that Statek went through. If anything, that
25 proves the point. Coudert was well aware standing back

1 watching this insane litigation where Statek had to litigate
2 for years to get control back where they demonstrated that
3 Coudert moved money to the Isle of Guernsey, that they bought
4 property for Johnston Spillane, that they moved artwork for
5 Johnston Spillane, that they rent an apartment in London, and
6 they sat back and then when they were requested for documents,
7 they just gave them the limited set of documents. And it
8 wasn't until 2002, 2004, 2008, 2009 when they thought that this
9 property of Statek, when they realized that they had billed
10 Statek for these services, that Statek was the only client ever
11 on their books, that they thought that that was okay.

12 If anything, that proves the malpractice point that
13 year after year when they begrudgingly would give up documents,
14 they weren't giving up everything. That's the malpractice
15 here. And the continuing relationship is based not only in the
16 fact that they represented Coudert for years and charged them
17 for it, but they continued to hold their property. That's a
18 special relationship. A lawyer has an obligation to return
19 property to a client on request. They were requested
20 repeatedly and I'm not saying that every time they gave
21 documents that's a violation. That's crazy. No one has said
22 that. The fact is that demonstrates they still had more
23 property.

24 And to counsel's rhetorical argument that means it's
25 endless; that's right. If your client is committing

1 malpractice endlessly, then they are exposed to suit endlessly
2 until it stops. And if Coudert finally in 2009 gave up all the
3 documents, okay, then it ends. It's not endless. It's endless
4 when they still are violating their ethical obligation to
5 return the property of their client. Thank you, Your Honor.

6 THE COURT: Okay.

7 MR. LITTLE: Oh, one other thing, Your Honor. I just
8 want to make sure that I didn't misunderstand. I don't believe
9 that a remand to Judge Underhill on the jurisdic -- personal
10 jurisdiction point would be a valid result here. The motion
11 should be denied --

12 THE COURT: Well, it wouldn't be a remand. It would
13 be -- I would give people an opportunity to obtain relief from
14 the stay, only that it wouldn't --

15 MR. LITTLE: But that would be evading the Second
16 Circuit's mandate. The Second Circuit instructed that
17 Connecticut choice of law apply. It didn't mean that somehow
18 the case could be referred back or however the procedure is to
19 Judge Underhill, who then -- and then they'd argue there's no
20 personal jurisdiction and then there would be a decision that
21 Connecticut choice of law doesn't apply. That would be an
22 evasion of the Second Circuit's decision. And like it or not,
23 that's the decision that has to be followed and faced.

24 THE COURT: Okay. All right, well, I would like
25 additional briefing on this, on two issues. The first is the